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# CONSTITUTIONAL STUMBLING BLOCKS TO LEGISLATIVE TORT REFORM

KENNETH VINSON\*

*Recent attempts by state legislators to reform the tort system have frequently been struck down by the courts on constitutional grounds. In this light, the author reviews the hostile judicial reactions to tort reform from the turn-of-the-century challenges to workers' compensation schemes through present day reform efforts. In the discussion of modern day efforts, the author focuses on attempts by the Florida Legislature to deal with the insurance crisis and then examines the Florida Supreme Court's use of state constitutional provisions to block these efforts. The author concludes that the judiciary should allow the legislature and the voters a freer hand in creating new tort law.*

**T**HE CURRENT debate over legislative tort reform—and its constitutionality—began almost a century ago when first, employers' liability bills, and later, workers' compensation bills, were offered in response to the turn-of-the-century tort crisis in the workplace. As the torts debate, then and now, has revealed to all the world, the stuff of torts is principally politics.<sup>1</sup> When judge and jury in accident cases choose damage-suit winners, they necessarily exercise discretionary governmental power.<sup>2</sup> Both lawyers and nonlawyers, moreover, struggle to influence this exercise of governmental power by which the costs of accidents are allocated between plaintiffs and defendants.<sup>3</sup> Given the bar's long love affair

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1. See Zacharias, *The Politics of Torts*, 95 YALE L.J. 698 (1986); Green, *Tort Law Public Law in Disguise* (pts. 1 & 2), 38 TEX. L. REV. 1, 257 (1959-60). For evidence that torts and too much politics may occasionally make for a scandal, see reports about controversy surrounding the Texas Supreme Court over alleged out-of-court contacts between justices and plaintiffs' lawyers with pending personal injury cases in Case, *Blind Justice*, TEXAS MONTHLY, May 1987, at 137, and Burka, *Heads, We Win, Tails, You Lose*, *id.* at 138. Texas plaintiffs' lawyers have been so successful in recent years in efforts to elect pro-plaintiff justices that the state high court has rewritten tort law to shift Texas' traditional pro-defendant stance to a decidedly pro-plaintiff stance; in the process, the reformist justices have gotten themselves embroiled in an investigation by a state legislative committee examining charges that the justices have been too cozy with certain members of the plaintiffs' bar.

2. Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1015-16 (1928).

3. See *infra* note 34; see also *infra* note 21 (report of President Reagan's speech at the U.S. Chamber of Commerce Headquarters to 300 business-leader representatives of the American Tort Reform Organization; during the speech picketers from the Ralph Nader-

with personal injury practice,<sup>4</sup> it is easy to understand the displeasure with which judges, bred like their practitioner colleagues to the common law, must view legislative intrusion into the litigation process of tort law.<sup>5</sup>

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founded Public Citizen Organization protested outside against the President's anti-plaintiff reform preferences); R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM; A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE 227 (1965) (key actor in political arena is the personal injury bar); Cargill, *Tort "Reforms" Hurt Us All*, LAW, MEDICINE AND HEALTH CARE, Vol. 13, No. 3, June, 1985; Ison, *The Politics of Reform in Personal Injury Compensation*, 27 U. TORONTO L.J. 385 (1977) (focusing on the personal injury bar and the private insurance industry, as well as on unions and organizations of the disabled, and concluding that in the long run the legal profession will damage its credibility by attempting to preserve a tort system "that is so utterly indefensible . . .") *Id.* at 402; Parker, *Facile Debate*, TRIAL, May, 1986, at 17 (ATLA's director of public affairs charges the Reagan Administration with overlooking the responsibility of the insurance industry for the insurance crisis); Perlman, *All Pain and Suffering is Not Equal*, TRIAL, June, 1986, at 5 (president of ATLA opposes legislative capping of jury awards:

"I don't care how much clout the special interests have; might is still not right. This one trial lawyer, and the 65,000 others, will fight to the end to keep the American courthouse open, to keep the power in the jury box, and to give the victims of society the right to seek full and fair compensation . . .

*Id.*; Perlman, *Unmasking the Fox*, TRIAL, April, 1986, at 5 (ATLA president says the fox in the henhouse is the insurance industry); Rutigliano, *Insurance Crisis for Doctors?*, TRIAL, May, 1986, at 29 (trial lawyer refutes American Medical Association campaign for malpractice reform); Stewart, *The "Tort Reform" Hoax*, TRIAL, July, 1986, at 89 (former president of Academy of Florida Trial Lawyers says insurance industry, not tort system, the culprit); *Auto Insurance: How It Works*, CONSUMER REP., Sept., 1984, at 546 (blames trial lawyers for blocking the advance of no-fault auto insurance); Blankenship, *Study Shows Million Dollar Awards Hard to Collect*, Fla. Bar News, June 15, 1986, at 5, col. 1 (studies released by Florida trial judges—while state legislators were debating damage-suit caps—downgrading financial impact of large verdicts); McHugh, *Trial Lawyers Tell Tales, Circle Wagons Against Tort Reform*, Chi. Daily L.B., Vol. 132, Feb. 18, 1986, at 1, col. 2; *Trial Lawyers' Legislative Fights with Physicians Could Prove Expensive*, L.A. Daily J., Dec. 26, 1985, at 1, col. 6; McHugh, *Bar Mobilizing to Meet Tort System Challenge*, Chi. Daily L.B., Vol. 131, Nov. 18, 1985, at 1, col. 5; Couric, *Whatever Happened to No-Fault?*, Nat'l L.J., Nov. 18, 1985, at 1, col. 3; Malcomb, *Doctors Prepare Attack on Suits for Malpractice*, N.Y. Times, Feb. 15, 1985, at A1, col. 2.

4. Silas, *Bitter Medicine*, A.B.A. J., April, 1986, at 20 (ABA rejects AMA's call for medical malpractice reforms, relying on extensive report of special ABA Committee on Medical Professional Liability headed by Dean Talbot "Sandy" D'Alemberte of the Florida State University College of Law). For the view that the bar's long love affair has stifled needed reform and has "profoundly disturbing implications," see Daniel P. Moynihan's forward to J. O'CONNELL, *ENDING INSULT TO INJURY; NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES* at xii (1975); likewise, see M. MAYER, *THE LAWYERS* at 263 (1966), for the charge that "money in personal injury lawsuits has corrupted two [law and medicine] professions."

5. Of course, some judges think their fellow judges have done too much (common law) reforming on their own. See, e.g., Hutchinson, *Beyond No-Fault*, 73 CALIF. L. REV. 755, 756 n.6 (1985) (on socialism).

To which side of the current tort reform debate does a good liberal belong? Is it in opposition, along with Ralph Nader and the personal injury bar, to legislation limiting tort recovery? Surely, this pro-plaintiff position is the traditional place for the liberal (the liberal judiciary, after all, according to the Reagan Administration, is the cause of the movement in

When legal associations such as the American Bar Association criticize tort reform proposals, or when judges rule statutes unconstitutional that displace or amend common law torts, it is clear that when looking for motivations some weight must be given to the legal community's self-interest, conscious or otherwise, in perpetuating a tort system that feeds so many lawyers.<sup>6</sup> This is not to say lawyers and judges can or should remain unaffected by their politics or their bread-and-butter. The problem is how does the observer know, when the legal community labels tort reform an unpatriotic undermining of our constitutional and adversarial way of life, how much to discount for professional self-interest. In the author's review of the hostile judicial reactions to tort reform in Florida, he assumes that despite judicial pledges to the rule of neutral principles, judicial preference for maintaining traditional tort law influences to some extent decisions invalidating reform statutes, and that in reviewing objections to tort reform, the lawyerly custom is to play the partisan in passionate spades.

In this Article, the author looks at a sampling of the successful twentieth-century constitutional attacks on tort reform legislation, and concludes that despite the occasional use of the power of judicial review to shield common law torts, the view expressed in Professor Sugarman's recent article *Doing Away with Tort Law* is correct:

I have long been unimpressed with the claim that states cannot simply repeal tort law for personal injury without thereby depriv-

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recent decades of tort law away from fault and toward a social insurance system—see *infra* note 21). On the other hand, for those liberals who see the present tort system as irretrievably flawed and see neither insurance companies nor the personal injury bar as white knights, then perhaps the reform bandwagon is the place to ride, hoping that reform will one day go beyond the present bandaid stage toward establishing compensation systems that will more frequently put insurance dollars into accident victims' pockets, at less cost to the public.

6. For surprising reports on the large percentage of the bar's collective income attributable to legal fees from personal injury litigation, see J. O'CONNELL, *THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE* 50-51 (1971). U.S. Senator Daniel P. Moynihan, when he wrote as a professor about the rapacious effect of lucrative personal injury litigation on lawyers sounded a dark note indeed: "If the bar cannot do anything but proceed with the squalid concerns that have characterized its dealing with this issue . . . then the bar is sicker than anyone knows . . ." Moynihan, *Changes for Automobile Claims*, U. ILL. L.F. 361, 369 (1967). The Florida Supreme Court suggests that legislative restrictions on the contingent fees of plaintiffs' lawyers would be unconstitutional. *In re The Florida Bar*, 349 So. 2d 630 (Fla. 1977). Meanwhile, in Texas, plaintiffs' lawyers recently gave sufficient funds to assure election of anti-tort reform judges to that state's high court. Paonita, *Voters in 3 States Reject Chief Justices*, Nat'l L. J., Nov. 17, 1986, at 3, col. 1.

ing people of due process rights. Such thinking reflects a long-past era of judicial intrusion into legislative policymaking in the area of economics and social welfare on substantive due process grounds.<sup>7</sup>

Before tracing recent Florida evidence of judicial discomfort with legislative tort reform, the author looks back to the early days of this century when another crisis, this time caused by a tort system overly keen on accepting employer defenses to workers' negligence suits, led to a constitutional struggle over no-fault compensation acts. From that battle over the legitimacy of workers' compensation came many of the reform ideas as well as many of the constitutional objections which are surfacing in connection with the current tort crisis. As was the case over seventy years ago with compensation for workplace accident victims, it is probable that future reforms, no matter how radical, are likely to stand up in the long run to even a relatively aggressive defender of traditional torts such as the Florida Supreme Court. Meanwhile, with legislatures annually cranking out tentative answers to our latter-day crisis in torts,<sup>8</sup> it is of interest to review the long struggle between those who would legislate new tort law and those members of the bar in loyal opposition.

Since the current tort reform movement began in the late 1960s, the Florida Supreme Court has been especially active in using the power of judicial review to slow down, although not halt, legislative attempts to modify tort law.<sup>9</sup> The court has struck down, under one theory or another: the property damage section of the Florida

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7. Sugarman, *Doing Away With Tort Law*, 73 CALIF. L. REV. 555, 617 n.270 (1985). For a general survey of constitutional litigation concerning early workers' compensation statutes and more recent no-fault legislation, see J. O'Connell, *supra* note 4, at 204-45.

8. *Infra* note 140. That there is a crisis in insurance coverage attributable in part to the expansion of tort liability is evidenced by data collected in Fort, Granger, Polston & Wilkes, *Florida's Tort Reform: Response to a Persistent Problem*, 14 FLA. ST. U.L. REV. 505, 533-544 (1986) [hereinafter Fort]. For a description of recent efforts of lawyer groups to persuade Florida's legislature that the insurance industry has created a false crisis, see *id.* at 536 n.166.

9. In this Article, the author, by reviewing the Florida Supreme Court's recent acceptance of claims of state constitution-based restraints on remedial tort legislation, offers some perspective on how those constitutional restraints may apply to the current rash of statutory changes. Of course, a complete review of such claims, not offered here, would include the numerous cases in which Florida courts have rejected constitutional attacks. See, e.g., *Florida Patient's Compensation Fund v. Von Stetina*, 474 So. 2d 783 (Fla. 1985) (periodic payments in medical malpractice cases upheld); *Pinillos v. Cedars of Lebanon Hosp. Corp.*, 403 So. 2d 365 (Fla. 1981) (collateral source rule upheld). See generally Fort, *supra* note 8.

Automobile Reparations Reform [No-Fault] Act;<sup>10</sup> the statute of repose barring after twelve years actions against engineers, architects, and contractors arising from real estate construction;<sup>11</sup> the Medical Mediation Act establishing pretrial mediation for medical malpractice claims;<sup>12</sup> the statute of repose barring products liability actions twelve years after date of sale;<sup>13</sup> and, in 1984, a citizens' effort to amend the Florida Constitution by public referendum to limit non-economic damages to \$100,000 and to abolish joint and several liability.<sup>14</sup>

If the history of constitutional challenges to tort reform is a reliable guide, the Florida Supreme Court will continue to dodge an all-out war with the state legislature over its tort reform efforts. The court, however, may insist in making its presence known by invalidating selected reform measures. Tort reform, after all, is too pressing a topic in these times of crisis for the judiciary, despite their devotion to their common law off-spring, to fire more than a few pot shots at the products of legislative tinkering. The judiciary, much to the sorrow of plaintiffs' lawyers everywhere, has been reduced, both early and late in this century, to a slow retreat before the legislative advance.

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10. *Kluger v. White*, 281 So. 2d 1 (Fla. 1973) (striking down FLA. STAT. § 627.738 (1971)). As for the remainder of Florida's automobile no-fault act, a divided court has with one minor exception sustained the constitutionality of the original act and amendments. See *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9 (Fla. 1974) (holding that Florida's Automobile Reparations Reform Act did not violate the state constitution's open courts clause.) See also *Chapman v. Dillon*, 415 So. 2d 12, 19 (Fla. 1982) (three of six sitting justices in *Chapman* said the no-fault act in important particulars bordered on the "outer limits of constitutional" tolerance; two of the justices said the elimination of pain and suffering damages for nonpermanent injuries, delineated in FLA. STAT. § 627.737(2) (1979), was unconstitutional under *Kluger*). For more on *Chapman*, see Note, *Insurance: Does Florida's No-Fault Law Comply With the Constitutional Right of Access to the Courts?*, 35 U. FLA. L. REV. 194 (1983); compare *Dimond v. District of Columbia*, 618 F. Supp. 519 (D.D.C. 1984) (\$5,000 threshold for noneconomic losses unconstitutional). For the opinion of two Florida lawyer-legislators that their no-fault automobile bill "involves the same policy considerations as workmans' compensation legislation [and should therefore be deemed constitutional]," see Gillespie & MacKay, *Florida's No-Fault Insurance Law*, 45 FLA. B.J. 400, 402 (1971).

11. *Overland Constr. Co. v. Sirmons*, 369 So. 2d 572 (Fla. 1979) (statute of repose in FLA. STAT. § 95.11(3)(c) (1975) violates open courts clause).

12. *Aldana v. Holub*, 381 So. 2d 231, 238 (Fla. 1980) (FLA. STAT. § 768.44 (1979) violates due process clauses of United States and Florida Constitutions).

13. *Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874 (Fla. 1980), *rev'd*, *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657 (Fla. 1985) (approving the result only of the *Battilla* decision striking down FLA. STAT. § 95.031(2) (1975)).

14. *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984).

## I. THE DEBATE OVER TORT REFORM

The Association of Trial Lawyers of America (ATLA) continues to protect the interests of accident victims, as ATLA sees those interests, by struggling to contain the current flood of tort reforms. Robert Habush, promising to fight to near-death to preserve for the bloodied and maimed the right to a common law jury, became ATLA president in 1986 just in time to kick off ATLA's newly-formed Constitutional Challenge Committee. These challengers are sifting through fifty state constitutions for ammunition to support future court attacks on tort reform statutes.<sup>15</sup> Challenge Committee Chairman Jerry Palmer reports, "We've identified and prioritized the harmful state statutes . . . and we have action plans from [trial bar] leaders in those states."<sup>16</sup>

President Habush also is promoting a second ATLA-sponsored entity devoted to protecting damage suit plaintiffs from the "ill wind" of the insurance crisis, the new Civil Justice Foundation. Habush says this foundation's information-gathering efforts are a monument to the good citizenship of trial lawyers and demonstrates the trial bar's "commitment to principle is for the greater good of the whole."<sup>17</sup> The logo for the Civil Justice Foundation symbolizes the paternalistic attitude that personal injury lawyers affect concerning their relationship to accident victims. The foundation's logo is, as ATLA puts it, "a tree, fruitful and flourishing, offering shelter and a refreshing gathering place for those who need to come together."<sup>18</sup>

ATLA has good reason to fear the waves of tort reform in this and the previous decade. Personal injury lawyers may one day, it appears, join the whooping crane in near-extinction. While most of the reform action today involves minor alterations of the tort sys-

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15. *Constitutional Challenges of Tort Reform Gear Up*, ATLA Advocate, Vol. 12, No. 7, Oct., 1986, at 1, col. 2. The Constitutional Challenge Committee advises that state constitutions are a riper source of challenge material than the federal constitution, presumably because the United States Supreme Court has for half a century opted out of the business of reviewing economic legislation for substantive due process defects. *Id.*

16. *Id.* at 1, col. 1. Palmer adds that ATLA is hiring a constitutional law professor to "consult in state constitutional law." Apparently, ATLA hopes that this will help prove in court that high insurance rates are the result of faulty insurance practices and not of the fault system, and that statutory caps placed on traditional tort damages are unconstitutional. *Id.*

17. Habush, *The Good Side of The Ill Wind*, TRIAL, Nov., 1986, at 5.

18. *Id.* The common law of torts, no matter what one thinks of current reform proposals, has in the past served fairly well in regulating the distribution of accident losses. Should tort law as we know it eventually expire, however, it deserves in burial a bouquet better than an overripe tree parked in front of an ATLA organization.

tem, a continuing crisis atmosphere will one day awaken legislators to the possibility, only mentioned in whispers now, of replacing large portions of the tort system with alternative compensation schemes modeled along the lines of workers' compensation, no-fault auto insurance, or perhaps tied to some form of social insurance.

As the debate in Florida and around the nation over tort reform waxes ever hotter, debaters are no longer confining themselves to courtrooms and legal periodicals. Today, insurance and industry groups, trial lawyers, editorial writers, consumer organizations, and politicians fill newspapers and magazines with charges and counter-charges over whether there is really a litigation explosion or a liability insurance crisis, and whether it is the lawyers, the doctors, the insurers, or the tort system itself which is the cause of it all.<sup>19</sup> Even the Reagan Administration, speaking through a special task force,<sup>20</sup> and the President himself,<sup>21</sup> has relaxed its preference for federalism long enough to ask Congress to consider national reforms limiting tort liability (especially strict liability) in a civil justice system which has begun "to go terribly wrong."<sup>22</sup>

Talk of more radical change is increasing. Several of the legal scholars writing in a recent torts symposium in the *California Law Review*<sup>23</sup> conclude that modern tort law is too bankrupt for the band-aid reforms currently in vogue among state lawmakers. Such measures as limiting joint and several liability, modifying the collateral source rule, capping pain and suffering damages and attor-

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19. The print media's coverage of, and participation in, the nation-wide tort debate during the first half of 1986 included these sample items: Church, *Sorry, Your Policy is Canceled*, *TIME*, March 24, 1986, at 16; Lacayo, *The Malpractice Blues*, *TIME*, Feb. 24, 1986, at 60; Kogan, *Tort Crisis: Disorder . . .*, *Americans for Legal Reform*, Vol. 6, No. 3, Spring, 1986, at 10, col. 1; Kilpatrick, *Facts Prove Slippery in Insurance-Crisis Debate*, *Rocky Mountain News*, June 11, 1986, at 69, col. 1; *Hold Down Awards to Ease this Crisis*, *USA Today*, June 6, 1986, at 12A, col. 1; Satter, *The Damage-Award Lottery*, *San Francisco Chron.*, May 25, 1986, (This World), at 20, col. 2; *Reform Time*, *Dallas Morning News*, May 3, 1986, at 30A, col. 1; *Torts Control*, *Wall St. J.*, Feb. 4, 1986, at 30, col. 1.

20. *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability*, U.S. Gov't Printing Office, Feb., 1986. For a report on the U.S. Justice Department's publicity campaign supporting Sen. Bob Kasten's (R., Wis.) recent bill, S. 100, 99th Cong., 1st Sess. (1985), aimed at reducing current products liability, see *Justice's Tort Bill Marked by Ambiguity*, *Legal Times*, May 19, 1986, at 2, col. 3.

21. *Reagan Asks for Limits on Lawsuits*, *Tacoma News Tribune*, May 31, 1986, at A3, col. 1.

22. *Id.*

23. *Symposium: Alternative Compensation Schemes and Tort Theory*, 73 *CALIF. L. REV.* 548 (1985).



neys' fees, and reducing the time within which damage claims may be filed in court are thought inadequate to deal with the real problem. More radical proposals by symposium contributors include scrapping tort law in favor of no-fault compensation programs financed either through first-party insurance, or through taxes on risk-producing enterprises or on the general public.<sup>24</sup>

One of the contributors to the California symposium, Professor Jeffrey O'Connell,<sup>25</sup> the co-father of no-fault auto insurance with Federal District Judge Robert Keeton,<sup>26</sup> has for two decades constantly reminded lawmakers that too many accident victims get either too little or nothing out of a tort system that wastes too many liability insurance dollars on mindless litigation.<sup>27</sup> Another symposium contributor, Professor David Owen, one of the revisers of that symbol of torts orthodoxy, the Prosser Hornbook,<sup>28</sup> surprisingly revealed that even he no longer believes in a tort approach.<sup>29</sup>

In the Berkeley symposium's lead article, *Doing Away with Tort Law*,<sup>30</sup> Professor Sugarman raises the question of the constitutionality of a wholesale abolition of tort law.<sup>31</sup> Sugarman aligns himself with former Harvard Dean Erwin N. Griswold in the belief that, consistent with federal constitutional law, Congress could abolish

24. See Schwartz, *Forward: Tort Scholarship*, 73 CALIF. L. REV. 548, 551-54 (1985); see also Pedrick, *Does Tort Law Have a Future?*, 39 OHIO ST. L.J. 782, 788 (1978) (Professor Pedrick predicts that by the year 2050, social insurance will largely have supplanted tort law's role in compensating accident victims).

25. O'Connell, *A "Neo No-Fault" Contract In Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CALIF. L. REV. 898 (1985).

26. R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM; A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE* (1965).

27. See generally J. O'CONNELL & B. KELLY, *THE BLAME GAME* (1987); J. O'CONNELL, *THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN* (1979); J. O'CONNELL, *ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES* (1975); J. O'CONNELL & R. HENDERSON, *TORT LAW, NO-FAULT AND BEYOND: TEACHING MATERIALS ON COMPENSATION FOR ACCIDENTS AND AILMENTS IN MODERN SOCIETY* (1975); J. O'CONNELL, *THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE* (1971). At the January 1987 meeting in Los Angeles of the American Association of Law Schools, O'Connell told a roomful of law teachers assembled at a January 3rd workshop on tort reform that the tort system is a "disaster," and that no reform will solve the system's inadequacies unless two things happen: the costly, irrelevant search for fault is ended, and damages for pain and suffering abolished so as to free up funds to permit some measure of compensation for a broader range of accident victims.

28. W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 722 (5th ed. 1984).

29. Owen, *Deterrence and Desert in Tort: A Comment*, 73 CALIF. L. REV. 665 (1985). For a contrary view that the traditional tort system is alive and well, see Hawkins, *Retaining Traditional Tort Liability in the Nonmedical Professions*, 1981 B.Y.U. L. REV. 33, 43-44 (1981).

30. 73 CALIF. L. REV. 555 (1985).

31. *Id.* at 617 n.270.

our much-beleaguered state-run tort system.<sup>32</sup> Sugarman confesses inability, however, to confidently predict how individual state courts, keying on state constitutions, might respond to radical legislative responses to the torts predicament.

## II. THE FIRST TORT CRISIS

Turn-of-the-century employers inadvertently set the stage for the revolutionary compensation system that today covers workplace accidents. Before workers' compensation, employers defending negligence suits of injured employees were overly successful in persuading judges of the merits of the common law defenses of contributory negligence, assumption of risk, and the fellow servant doctrine. Workers rarely won negligence awards, and the injustice of an industrial system which left its victims bloody and in poverty led to the first tort crisis. Within a short time, tort law in the workplace was abolished and replaced by universal workers' compensation schemes.<sup>33</sup> These early legislative no-fault schemes presaged the more general retreat underway today from the nineteenth-century focus on fault. Since World War II, the shift through both judicial and legislative lawmaking toward stricter forms of tort liability has accelerated. This trend toward downplaying the elusive search for culpability and toward promoting a more general shift of accident losses to the enterprise was perhaps inevitable once workers' compensation proved the answer for our largest class of accident victims. Similarly, the growth of liability insurance, by providing funds for broader coverage, accelerated the loss-shifting.

Professor Jeremiah Smith, commenting at a time when workers' compensation bills were gathering majority votes in state legislatures, foresaw that tort law would never be the same.<sup>34</sup> He foretold how trial judges might, even under the guise of a fault system, manipulate burdens of proof and the *res ipsa loquitur* doctrine so as to facilitate compensating injured plaintiffs. Smith also foresaw the fate of contributory negligence, "a decadent doctrine, which will ultimately disappear from the law."<sup>35</sup> And finally, Smith looked ahead to the tensions which would exist in a legal world where no-

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32. *Id.*

33. See Rhodes, *The Inception of Workmen's Compensation in the United States*, 11 ME. L. REV. 35 (1917).

34. Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235, 344 (1913-14).

35. *Id.* at 243.

fault compensation systems stand alongside a common law fault system: "In the end, one or the other of the two conflicting theories is likely to prevail."<sup>36</sup>

#### A. *Anti-Reform Judicial Review in The Employers' Liability Cases*

The tension between the common law negligence system and legislative reform preceded even the workers' compensation movement. This tension arose toward the end of the last century when employers' liability acts were passed that modified or abolished the common law defenses that so regularly defeated plaintiff workers.<sup>37</sup> Judges already fond of strictly construing any statute passed in derogation of common law naturally objected to legislative tinkering with negligence law. The most notable occasion of anti-reform judicial review was in *The Employers' Liability Cases*.<sup>38</sup> There, the United States Supreme Court struck down Congress' 1906 Employers' Liability Act, a law abolishing the (contributorily negligent) fellow servant defense and installing a comparative negligence system for the benefit of employees of "common carriers engaged in commerce between the states."<sup>39</sup>

The Supreme Court in *The Employers' Liability Cases* strained to read the congressional policy imposing comparative negligence principles on common carriers<sup>40</sup> so broadly that a Court majority concluded Congress was attempting to unconstitutionally regulate intrastate as well as interstate operations.<sup>41</sup> It is difficult when re-

36. *Id.* at 363. Professor Smith opined further that "many lawyers" would resist the extension of the workers' compensation theory to other than injured workers. *Id.* at 367. On the other hand, with respect to actual lawyer reaction to proposed workers' compensation bills, a typical response was the pro-compensation report from the Ohio State Bar, stressing the merit of there being "no contingent fees to absorb half of the compensation. It may work hardship on certain lawyers, but they will get into better employment." *Compensation Law*, 8 OHIO L. REP. 191 (1910). See also *Cunningham v. Northwestern Improvement Co.*, 44 Mont 180, 211, 119 P. 554, 562 (Mont. 1911) ("legislation of this nature [workers' compensation] is in its infancy, and if it be found adequate to correct the evils growing out of the present system it may gradually be extended to apply to all extra hazardous employments."); *Rollins, A Proposal to Extend the Compensation Principle to Accidents in the Streets*, 4 MASS. L.Q. 392 (1919).

37. Rhodes, *supra* note 33, at 41-42. Rhodes reports that "the necessity for changes in the common law system was becoming recognized in the United States during the last quarter of the nineteenth century." *Id.* at 36.

38. *Howard v. Illinois Central Ry.*, 207 U.S. 463 (1907).

39. 34 Stat. 3073 (1906).

40. *Howard*, 207 U.S. at 499.

41. *Id.* at 496-502. This was the period when the concept of interstate commerce was still relatively narrow, and it was therefore a simple matter for the Court to save the fellow

viewing *The Employers' Liability Cases* not to be shocked at the aggressiveness of the Supreme Court's defense of the bar's common law heritage against the legislative invaders. Although Congress' 1906 language describing the scope of the Employers' Liability Act may have been somewhat ambiguous, the constitutional axe was hardly called for.

Congress' language limiting the Act's coverage to "common carriers engaged in commerce between the states" need not have been read to cover local activities of common carriers that did even a partially interstate business; the Act easily could have been deemed to cover only the interstate operations of common carriers. Given the well-known limits on the commerce power, and the Court's oft-professed practice of avoiding constitutional issues,<sup>42</sup> reading the Employers' Liability Act constitutionally to reach only interstate business would have been very appropriate. This is especially true as both plaintiffs in these combined cases were working in interstate travel when they were hurt.

Justice Moody's dissent in *The Employers' Liability Cases* cuts through the shallow rhetoric of the commerce clause argument to chastise the majority for their misplaced loyalty to the withered hand of the common law past. Moody also raises a matter still alive today as legislators grapple with the failings of tort law: should common law courts step aside and give legislators ample room to set economic (tort) policy. Moody concludes:

The common-law rules have taken form through the decisions of courts, whose judges in announcing them were controlled by their views of what justice and sound public policy demanded . . . . But the economic opinions of judges and their views of the requirements of justice and public policy, even when crystallized into well-settled doctrines of law, have no constitutional sanctity . . . . Legislators have their own economic theories, their own views of justice and public policy, and their views when embodied in a written law must prevail. Whenever the legislative power to change any of these rules of the common law has been drawn in question in this court it has been sustained.<sup>43</sup>

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servant defense by reading the Employers' Liability Act broadly so as to set up a conflict with the then-narrow boundaries of congressional commerce power.

42. A portion of Justice Moody's long dissent documents the Court's practice of reading legislative acts so as to prefer, among alternative readings, that version most readily consistent with the Constitution. *Id.* at 509-519.

43. *Id.* at 537-38. The Supreme Court by 1911 saw its way clear to sustain later employers' liability acts. See *Second Employers' Liability Cases*, 223 U.S. 1 (1911). Justice Moody's

### B. Constitutional Block to a Workers' Compensation Act

The highwater mark in judicial willingness to place a constitutional stumbling block in the way of interfering legislators is the New York Court of Appeals' disapproval of that state's compulsory workers' compensation act<sup>44</sup> in *Ives v. South Buffalo Railway Co.*<sup>45</sup> Chief Justice Cullen in *Ives* could imagine no legal world (at least where substantive due process is king) in which tort liability could be based on any principle save fault. Cullen's words in *Ives*, though out of place in today's more restrained legal discourse, nevertheless reflect the undercurrent of lawyerly attachment to the fault system which still runs deep: "It is the physical law of nature, not of government, that imposes upon one meeting with an injury, the suffering occasioned thereby . . . . I know of no principle on which one can be compelled to indemnify another for loss unless it is based upon contractual obligation or fault."<sup>46</sup>

Furthermore, the *Ives* court saw no policy justification for workplace compensation plans because, in that court's odd view, compensation for the injured "does nothing to conserve the health, safety, or morals of the employe's [sic]."<sup>47</sup> The *Ives* majority then issued the call to constitutional arms for all those who see today's judges as properly exercising judicial veto power over tort reform legislation:

Under our form of government, however, courts must regard all economic, philosophical, and moral theories, attractive and desirable though they may be, as subordinate to the primary question [of constitutionality] . . . . [T]he rigidity of a written Constitution may at times prove to be a hindrance to the march of progress,

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deference to legislative solutions for compensating accident victims apparently represents current federal constitutional law. See *supra* note 15 and *infra* notes 49-55 and accompanying text. It is only in state courts that defenders of the *status quo* in torts have of late asserted state constitutional claims successfully.

44. 1910 N.Y. Laws § 674. Entitled "An act to amend the labor law, in relation to workmen's compensation in certain dangerous employments," New York's law was modeled on the English act of 1897, and was promulgated only after a thorough commission study of the negative impact of traditional negligence doctrines in the workplace and of the likely effects of a mandatory compensation insurance program. See *supra* note 33, at 51-52.

45. 94 N.E. 431 (1911).

46. *Id.* at 449 (Cullen, C.J., concurring). The *Ives* court grounded its ruling of unconstitutionality on the due process clauses of both the state and federal Constitutions. *Id.* at 439.

47. *Id.* at 442. For a contemporary review of *Ives* that found something good to say about both sides of the due process issue, see Bruce, *The New York Employers' Liability Act*, 9 MICH. L. REV. 684 (1911).

yet more often its stability protects the people against the frequent and violent fluctuations of . . . 'public opinion.'<sup>48</sup>

Despite *Ives*, workers' compensation laws soon carried the day, and when the United States Supreme Court gave federal due process approval to compensation acts, the justices asserted that "[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."<sup>49</sup> When in 1929 the Supreme Court rejected an equal protection attack on a state statute stripping automobile guest passengers of their traditional negligence action, the Court said that the United States Constitution "does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object."<sup>50</sup> Yet despite the Supreme Court's traditional deference to legislative amendment of common law torts, that Court never closed the door to judicial review.<sup>51</sup> This crack in the door has given courage of late to state court judges in Florida and elsewhere to sit in constitutional judgment over statutory reform.

### III. MORE RECENT JUDICIAL REVIEW

The United States Supreme Court has recently reinforced its hands-off policy regarding tort reform by refusing to review two

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48. *Ives*, 94 N.E. at 437. The "public opinion" of New Yorkers referred to in the text in fact worked to amend the state constitution in 1913 to reverse *Ives*. Later, the state legislature enacted another compensation act which the Supreme Court concluded met due process requirements. *New York Cent. R.R. v. White*, 243 U.S. 188 (1917). Shortly after *Ives*, other state courts rejected *Ives* and upheld workers' compensation statutes. See, e.g., *In re Opinion of Justices*, 209 Mass. 607, 96 N.E. 308 (1911); *State v. Clausen*, 65 Wash. 156, 117 P. 1101 (1911); *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N.W. 209 (1911).

49. *New York Cent. R.R. v. White*, 243 U.S. 188, 198 (1917) (citations omitted). The Court also rejected due process claims to a jury trial and an equal protection argument keyed to the New York act's exclusions from coverage of farm laborers and domestic servants. *Id.* at 208. The Court in *White* explicitly left open the question whether, consistent with the United States Constitution, a state "could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead." *Id.* at 201.

50. *Silver v. Silver*, 280 U.S. 117, 122 (1929) (citations omitted).

51. See *White*, 243 U.S. at 188. The closest the Court has come to foreclosing federal judicial review of tort reform was to conclude that in *White* it was unnecessary, "for the purposes of the present case, to say that a State might, without violence to the constitutional guarantee of 'due process of law,' suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute." *Id.* at 201.

California Supreme Court medical malpractice cases<sup>52</sup> upholding statutory limits on pain and suffering awards<sup>53</sup> and attorneys' fees.<sup>54</sup> The Court, moreover, when it recently approved the nuclear accident damage limits imposed by Congress' Price-Anderson Act, stated that "it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy."<sup>55</sup>

However, this "reasonable substitute remedy" requirement that the Supreme Court refused to adopt has surfaced in Florida's courts. In the 1970s high liability insurance rates prompted the Florida Legislature to pass an automobile no-fault act,<sup>56</sup> statutes of repose,<sup>57</sup> and a medical mediation act mandating pretrial medical malpractice panels.<sup>58</sup> Constitutional attacks on these reforms met with some success in the Florida Supreme Court despite the low esteem into which doctrines smacking of economic substantive due process have generally fallen. Resourceful Florida justices merely devised a new constitutional rationale for demanding a "reasonable substitute," and declared in *Kluger v. White*<sup>59</sup> that this new constitutional rationale is grounded in the open courts language of article I, section 21, of the Florida Constitution: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

52. *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985) (cap on pain and suffering awards), *appeal dismissed for want of a substantial federal question*, 106 S. Ct. 214 (1985); *Roa v. Lodi Medical Group, Inc.*, 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985) (cap on attorneys' fees), *appeal dismissed*, 106 S. Ct. 421 (1985).

53. CAL. CIV. CODE § 3333.2 (West Supp. 1987) (limiting noneconomic losses in medical malpractice cases to \$250,000). For a recent case finding equal protection defects in a statutory cap on damages assessed against public entities, see *Pfost v. Montana*, 713 P.2d 495 (Mont. 1985).

54. CAL. BUS. & PROF. CODE § 6146 (West Supp. 1987) (limiting attorneys' fees in medical malpractice cases to a schedule that includes a 10% cap on awards over \$200,000).

55. *Duke Power Co. v. Carolina Env'tl. Study Group*, 438 U.S. 59, 88 (1978).

56. FLA. STAT. §§ 627.730-.741 (1971).

57. FLA. STAT. § 95.11(3)(c) (1975); *supra* note 11 and accompanying text; FLA. STAT. § 95.11(4)(b) (1975) (medical malpractice), analyzed for possible constitutional defects in Note, *The Florida Medical Malpractice Reform Act of 1975*, 4 FLA ST. U.L. REV. 50, 64-65 (1976); and FLA. STAT. § 95.031(2) (1975) (products liability and fraud actions).

58. FLA. STAT. § 768.44 (1979).

59. 281 So. 2d 1 (Fla. 1973).

### A. The Open Courts Provision

The wording of Florida's open courts provision, though much revised, has found a place in all the state's past constitutions.<sup>60</sup> A similar provision is present in the constitutions of two-thirds of the states.<sup>61</sup> In addition, the New Mexico Supreme Court recently read into that state's due process clause an implied open courts guarantee.<sup>62</sup> Yet, despite the popularity of open courts provisions, the original intention of constitutional drafters is unclear. Whatever the historical anxieties prompting open courts clauses in Florida's parade of constitutions,<sup>63</sup> that shadowy history has little relevance in the current fight between judges and legislators over the future direction of tort law.

In the past decade and a half, however, state courts in Florida and elsewhere have nevertheless begun to subject various tort reform measures to an open courts test. Half the courts, though, have rejected arguments that open courts clauses place constitutional limits on legislative power to modify tort doctrines.<sup>64</sup> Some courts that refuse to read an open courts clause so as to handcuff legislative reform believe a literal reading of such clauses would shift massive policymaking authority to judges and unduly deprive legislatures of power to revise tort law.<sup>65</sup>

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60. FLA. CONST. of 1838, art. 1, § 9; FLA. CONST. of 1861, art. 1, § 9; FLA. CONST. of 1865, art. 1, § 9; FLA. CONST. of 1885, § 4 Dec. of Rights. With the 1968 revision of the Florida Constitution, section 4 of the Declaration of Rights became article 1, § 21, and the provision's language was condensed into its present form.

61. See McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U.L. REV. 579, 615 n.218 (1981). Apparently, the Magna Carta started the ball rolling: "to no one will we sell, to no one will we deny, or delay right of justice." *Id.* at n.219.

62. *Jiron v. Mahlab*, 99 N.M. 425, 659 P.2d 311, 312 (1983) (holding that New Mexico's statutory medical malpractice procedure requiring pretrial review by a nonjudicial panel denies open courts).

63. Apparently, the drafters of the Magna Carta's open courts provision were concerned about the royal practice of selling justice, or the right to delay or deny justice, for the price of a fine. See *Kennedy v. Cumberland Eng'g Co.*, 471 A.2d 195, 201 (R.I. 1984) (Murray, J., dissenting).

64. For a survey of decisions judging the constitutionality of various statutes of repose under open courts clauses, see McGovern, *supra* note 61, at 616-18; Case Note, *Manufacturers Must Seek Alternative Limitations to Liability as New Hampshire Supreme Court Strikes Down State Statute of Repose: Heath v. Sears, Roebuck & Co.*, 18 SUPPL. U.L. REV. 757, 767-69 (1984).

65. See, e.g., *Freezer Storage, Inc. v. Armstrong Cork Co.*, 476 Pa. 270, 281, 382 A.2d 715, 721 (1978). For the view that an open courts clause expresses no constitutional mandate, but merely a philosophy of access, see *Thornton v. Mono Mfg. Co.*, 99 Ill. App. 3d 722, 425 N.E.2d 522, 526 (1981). Another judicial response which strips the open courts clause of substantive teeth by limiting its effect to the preservation of procedural rights is found in



At the other end of the spectrum are those courts that, like Florida's high court in *Kluger*, have applied open courts provisions to insulate common law torts from reforms that shock the judicial conscience.<sup>66</sup> Until the recent crisis in tort law, the promise of open courts in Florida's article I, section 21, was a constitutional lightweight, most often mentioned as an afterthought in conjunction with due process and other constitutional provisions pertaining to procedural issues.<sup>67</sup> Prior to *Kluger*, in other words, Florida's open courts provision was considered more or less redundant.

### B. *The Kluger Opinion*

Some state court judges in dealing with the recent invasion by legislatures into the tort area have found open courts clauses convenient justifications - along with other constitutional guarantees of equal protection, jury trials, due process, and prohibitions against special laws - for exercising sometimes aggressive judicial review.<sup>68</sup> The "polestar decision for the construction"<sup>69</sup> of Florida's open courts clause is the *Kluger* court's voiding of the property damage provisions of the state's no-fault auto insurance act. As the tort reform movement gathered steam, *Kluger* gave notice to the Florida Legislature that the justices would not sit by and watch tort doctrines displaced without at least a few delaying actions.

The passage of limited no-fault auto insurance acts by nearly half the states in the early 1970s was accomplished despite the in-

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Pinnick v. Cleary, 360 Mass. 1, 271 N.E.2d 592, 600 (1971) (upholding the state's first-in-the-nation automobile no-fault statute).

66. See, e.g., Heath v. Sears, Roebuck & Co., 123 N.H. 512, 464 A.2d 288, 294-96 (1983) (12-year products liability statute of repose voided); Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996, 1003-04 (Ala. 1982) (10-year statute of repose voided).

67. See generally Note, *Article I, Section 21: Access to Courts in Florida*, 5 FLA. ST. U.L. REV. 871 (1977).

68. McGovern, *supra* note 61, at 604. See also Arneson v. Olson, 270 N.W.2d 125, 132 (N.D. 1978), for that court's invalidating of the North Dakota Medical Malpractice Act in the name of substantive economic due process, which "North Dakota has never renounced . . . as a constitutional standard . . . ."

Florida's open court's clause is now being called into the Florida Bar's service to protect lawyers against the state's new five percent sales tax on a wide variety of services. The president of the Florida Bar filed suit challenging the tax on lawyer services the week following the Florida Supreme Court's voiding, in the name of open courts, the legislature's \$450,000 ceiling on noneconomic damages. Cotterell, *Lawsuits Filed Against Services Tax*, Tallahassee Democrat, May 2, 1987, at 1A, col. 1. If the open courts clause can insulate Florida lawyers from such a tall damages ceiling as \$450,000, and also from a general sales tax, the clause should be renamed the be-kind-to-lawyers clause.

69. Overland Constr. Co. v. Sirmons, 369 So. 2d 572, 573 (Fla. 1979) (majority opinion by England, C.J.).

tense, and partly successful, opposition of lawyers.<sup>70</sup> Judicial opposition to no-fault auto insurance may also have been indicated by the eagerness of some high court judges to initiate some form of comparative negligence. By promising more relief for traffic victims through the common-law adoption of comparative fault, these judges perhaps hoped to foil legislative proponents of automobile no-fault, or at least to hold no-fault coverage down to small claims.<sup>71</sup> Such judicial reformation of the common law by sweeping comparative fault announcements highlights a supreme irony in this tort reform struggle: the juxtaposition of judicial willingness to initiate broad reforms in areas such as products liability and charitable immunities, alongside judicial insistence that tort-reforming legislatures bow to judicial vetoes grounded in vague constitutional allusions to open courts, jury trials, and so forth.<sup>72</sup>

Before the *Kluger* court killed the no-fault section that stripped automobile owners of tort claims regarding minor property damage, the no-fault law required Floridians who wished to secure these property interests to buy first-party insurance with respect to the first \$550 of damages arising out of an automobile accident. It was in part because of the high transaction costs in administering such nuisance claims that liability insurance premiums became so costly. The legislature, by forcing automobile operators to either buy collision insurance or gamble with respect to dented fenders, hoped to reduce the total cost of car insurance and thus make the new no-fault act attractive.<sup>73</sup>

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70. "[No-fault auto reform] has run into a stone wall in state legislatures across the country . . . . In state after state, the plan has been defeated or bottled up in committees, often through the efforts of powerful lobbies of lawyer groups and insurance companies, both of which are heavily represented among members of state legislatures." King, *'No-Fault' Auto Insurance is Stalled in Legislatures*, N.Y. Times, Nov. 15, 1970, at 70, cols. 4-5; See also J. O'CONNELL, *THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN* 158 (1979); Morris, *Few States Expected to Act This Year on Proposals for No-Fault Insurance*, N.Y. Times, May 9, 1971, at 60, cols. 1-3.

71. Since the late 1960's saw such a rush, by judges and legislators alike, to comparative negligence, some commentators have suggested that one motive was to undermine proponents of no-fault auto insurance. See, e.g., M. FRANKLIN & R. RABIN, *CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 372 (3d ed. 1983). The Florida Supreme Court added comparative fault to state tort law in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

72. See Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555 (1985). A similar irony dwells among members of the personal injury bar who "have loudly applauded—and indeed often initiated—moves toward increased liability and compensation, yet they invariably oppose compensation so freely available that litigable issues vanish." J. O'CONNELL & R. HENDERSON, *TORT LAW, NO-FAULT AND BEYOND* 66 (1975).

73. Note, *Florida Supreme Court Finds Fault With No-Fault*, 28 U. MIAMI L. REV. 468, 469 (1974).

The *Kluger* court began its review of the legislature's removal of dented-fender claims from the tort system by recognizing that it had never before considered whether "the constitutional guarantee of [open courts] bars the statutory abolition of an existing remedy without providing an alternative protection."<sup>74</sup> The court, foregoing an economic analysis which might make comparisons between no-fault and a traditional fault system meaningful, plunged ahead to create a standard for evaluating legislative tort reform that casts a constitutional cloud on much of the reform legislation coming out of Tallahassee.<sup>75</sup> Under the *Kluger* test, statutory reform that withdraws a common law tort remedy must provide what the court found missing in the legislature's scheme for dented-fender losses: "[A] reasonable alternative to protect the rights of the people of the State to redress for injuries [or else] show an overpowering public necessity for the abolishment of such right . . . ."<sup>76</sup>

Given the *Kluger* court's judgment that Florida courts should vigorously review reform legislation, what about the quality of the *Kluger* review itself? The court's principal failing was in how the justices applied their "reasonable alternative" test. The court, by refusing to look at the no-fault act in its entirety, failed to balance the act's total contribution to the economic welfare of traffic victims against the act's partial abolition of tort claims for both personal injuries and property damages. Instead, the court took a piecemeal approach and focused only on that portion of the no-fault act that removed dented-fender claims from the tort system.<sup>77</sup> The court's tunnel vision led it to inquire only whether the legislature provided any precise *quid pro quo* for taking away the tort action for the first \$550 of automobile damage.

Even given the court's piecemeal approach, there is a good argument that the no-fault act actually gave auto owners a precise *quid pro quo* for their lost dented-fender claim. The *Kluger* court, however, neglected to mention that in exchange for the lost cause of action for the dented fender, the no-fault act gave each owner a personal \$550 exemption from tort liability for the other party's dented fender. Another no-fault trade-off the court overlooked was the auto owner's chance to escape the higher insurance premium attributable to small property claims.

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74. *Kluger v. White*, 281 So. 2d 1, 3 (Fla. 1973).

75. *Id.* at 4.

76. *Id.*

77. *Id.* at 2.

Thus the Florida Supreme Court objected to the legislature's judgment that auto owners in dented-fender situations be given an option to either buy first-party insurance or gamble. The *Kluger* court suggested, oddly, that had the legislature mandated that drivers buy first-party protection against dented fenders, a "reasonable alternative" to open courts would have been provided.<sup>78</sup> Yet surely a legislature that can mandate first-party insurance can elect to give the vehicle owner the option to buy collision coverage. The *Kluger* court seemed to say that a "reasonable alternative" must somehow translate into specific sums of money in the traffic victim's pocket.

Of course, the realistic way to weigh the losses and benefits of automobile no-fault is to consider all the trade-offs, including the *guaranteed* partial compensation for economic losses and medical expenses growing out of personal injury. This the Florida Supreme Court failed to do in *Kluger*. A year later, however, the court backtracked when reviewing the personal injury part of the no-fault auto insurance act. It sustained the act's abolition of below-threshold pain and suffering damages by finding elsewhere in the act "reasonable" trade-offs in the form of benefits such as the limited immunity from tort liability for pain and suffering which automobile owners covered by no-fault insurance enjoy.<sup>79</sup>

If the *Kluger* court's piecemeal strategy for administering its "reasonable alternative" test were invoked outside the *Kluger* facts, logic would dictate ruling unconstitutional not only much of automobile no-fault, but also much of workers' compensation law. Workers' compensation statutes, of course, alter prior legal rights at common law much more drastically than does automobile no-fault. For example, workers' compensation acts abolish all pain and suffering awards and provide no specific alternative remedy by which injured workers may recoup such losses. Fortunately, the *Kluger* logic contained in Justice Adkins' majority opinion has

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78. *Id.* at 5.

79. *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 13-14 (Fla. 1974). What if the Florida Legislature had written its auto no-fault law as a complete substitute for the personal injury claim, similar to the replacement of that law by workers' compensation acts? Perhaps we would have seen *Ives II* in the Florida reports. Compare with California Supreme Court's judgment upholding abolition of unlimited noneconomic damages in medical malpractice cases: "[T]he preservation of a viable medical malpractice insurance industry in this state [would provide the necessary *quid pro quo*]." *Fein v. Permanente Medical Group*, 38 Cal.3d 137, 695 P.2d 665, 681-682 n.18, 211 Cal. Rptr. 368 (1985) *appeal dismissed* 106 S.Ct. 214 (1985).

stayed at home,<sup>80</sup> almost as if the court knows better than to push its power of judicial review too far. The *Kluger* dissenters argued that the court should defer to the legislature's tort reform efforts, noting the similar defects in the tort system that led to both workers' compensation and automobile no-fault. The dissenting justices, after emphasizing the extensive legislative investigations which led to Florida's no-fault act, concluded that auto no-fault, like workers' compensation, is for "the greater good of society and social justice."<sup>81</sup>

#### IV. LEGISLATIVE ATTEMPTS AT REFORM

Mandatory no-fault auto insurance was but one of several responses to rising liability insurance rates adopted by the Florida Legislature in the 1970s. Among these reforms were statutes of repose which set time limits for selected tort actions. These repose deadlines for filing claims begin running not when injury occurred or is discovered, but from the date of a defendant's questioned conduct. One such Florida statute of repose, which limited to twelve years possible law-suits against engineers, architects, and contractors arising out of real estate construction,<sup>82</sup> was struck down, on the authority of *Kluger*, in *Overland Construction Co. v. Sirmons*.<sup>83</sup>

The court in *Sirmons* dealt with a negligence claim arising out of an accident in a building erected by the defendant contractor and accepted by the owner fourteen years earlier. The injured plaintiff was not in privity with defendant contractor. Until late in the life of the common law, such a contractor, absent privity and after acceptance of a completed building, was not liable in tort for negligent work.<sup>84</sup> The Florida Supreme Court reformed tort law in 1959

80. Also difficult to square with *Kluger* is *McMillan v. Nelson*, 149 Fla. 334, 5 So. 2d 867 (1942), in which the court approved as constitutional a guest act which stripped automobile guest passengers of their negligence actions (as distinguished from gross negligence actions) against drivers. The three dissenting justices in *Kluger* took a broader view of the no-fault act; they compared the worth of the act's total payoffs against the traditional tort action. *Kluger*, 281 So. 2d at 5-10 (Boyd, J., dissenting). The dissenters cited extensively from the Massachusetts Supreme Judicial Court's constitutional validation of that state's groundbreaking automobile no-fault statute. See *Pinnick v. Cleary*, 360 Mass. 1, 271 N.E.2d 592 (1971). The Massachusetts court rejected a claim of unconstitutionality based upon an open courts clause much like Florida's.

81. *Kluger v. White*, 281 So. 2d 1, 10 (Fla. 1973).

82. FLA. STAT. § 95.11(3)(c) (1975).

83. 369 So. 2d 572 (Fla. 1979).

84. See generally W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 722 (5th ed. 1984).

to deprive independent contractors of this traditional tort immunity and recognized a post-acceptance cause of action.<sup>85</sup>

Yet in *Sirmons*, the court boldly told reform legislators that their statute-of-repose modifications of this newly-minted judicial tort violated article I, section 21's open courts promise. The *Sirmons* majority made no mention of crisis, either real or illusory, in liability insurance, and therefore found no "public necessity,"<sup>86</sup> overpowering or otherwise, for legislative intervention. Nor did the justices in *Sirmons* discuss other Florida statutes of repose<sup>87</sup> when they criticized this particular statute of repose for real estate improvements as special legislation benefiting "only one class of defendants."<sup>88</sup>

The court did recognize, however, that most other state courts have ruled constitutional similar statutes of repose passed in recent years as crisis legislation in response to consumer anguish over rising insurance rates. Chief Justice England in *Sirmons* nevertheless argued that Florida's open courts standard is a higher hurdle for tort reform statutes than are state or federal due process or equal protection clauses.<sup>89</sup> Even so, the Florida Supreme Court's record in statute-of-repose cases, both before and after *Sirmons*, indicates a certain judicial nervousness in the face of the reform movement.

One year before *Sirmons*, the court in *Bauld v. J. A. Jones Construction Co.*,<sup>90</sup> sustained the constitutionality of the twelve-year statute of repose for actions against distributors of defective products. *Bauld's* facts were somewhat different from those in *Sirmons* as the plaintiff in *Bauld* had a cause of action that matured somewhat prior to the statute-of-repose cutoff and therefore had the opportunity to file suit before repose set in. Thus the court in *Sirmons* insisted that *Bauld* was distinguishable.<sup>91</sup> But the result in *Sirmons* can hardly be squared with these words from *Bauld*: "[The state's repose deadlines] did not abolish any right of access to the courts; they merely laid down conditions upon the exercise of such a right."<sup>92</sup>

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85. *Slavin v. Kay*, 108 So. 2d 462, 465-67 (Fla. 1959).

86. *Sirmons*, 369 So. 2d at 574.

87. *See supra* note 57.

88. *Sirmons*, 369 So. 2d at 574.

89. *Id.* at 575.

90. 357 So. 2d 401 (Fla. 1978).

91. *Sirmons*, 369 So. 2d at 574.

92. *Bauld*, 357 So. 2d at 402.

Finally, the court in *Battilla v. Allis Chalmers Manufacturing Co.*,<sup>93</sup> three years after adopting in *Bauld* a tolerant posture regarding repose for defective products suits, changed direction and ruled that the state's twelve-year statute of repose for products liability cases did, after all, unconstitutionally limit court access. So with *Batilla* in 1981, a court which only eight years earlier had itself turned tort law around by replacing the contributory negligence doctrine with comparative negligence,<sup>94</sup> saw fit to slap legislators down for enacting a modest statute of repose.

But *Batilla* was short-lived. A nervous Florida Supreme Court receded from *Batilla* in *Pullum v. Cincinnati, Inc.*<sup>95</sup> Now, a statute of repose in defective products cases squares with the open courts provision, although the repose law killed in *Sirmons* is still dead because, the court reasoned in *Pullum*, the "useful life of buildings is obviously greater [and thus the twelve-year repose deadline harsher] than most manufactured products."<sup>96</sup> The court in *Pullum* moreover backed off from the aggressive *Kluger* stance by diluting *Kluger's* "reasonable alternative" and "overpowering public necessity" tests. *Pullum* asked only whether the statutory repose period bore a "rational relationship to a proper state objective."<sup>97</sup> Whether *Pullum* means the Florida Supreme Court will hereafter play a more restrained role in reviewing legislative tort reform remains to be seen. The court's 1987 voiding just before this article went to press of the legislative cap on pain and suffering damages, unless reversed on rehearing, suggests that future deference to the state legislature in these matters is far from assured.

### A. The Medical Mediation Act

Another yes-and-no performance by the Florida Supreme Court in litigation surrounding modern tort reform involved the Florida Medical Mediation Act.<sup>98</sup> Before this act was ruled unconstitutional in *Aldana v. Holub*,<sup>99</sup> much to the delight of plaintiffs' law-

93. 392 So. 2d 874 (Fla. 1980). *Accord* *Kennedy v. Cumberland Eng'g Co.*, 471 A.2d 195 (R.I. 1984). Only a handful of the states' highest courts have considered constitutional challenges to products liability statutes of repose. *Id.* at 203 (Murray, J., dissenting).

94. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

95. 476 So. 2d 657 (Fla. 1985).

96. *Id.* at 660 (quoting *Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874 (Fla. 1980) (McDonald, J., dissenting)).

97. *Id.*

98. FLA. STAT. § 768.44 (1979).

99. 381 So. 2d 231 (Fla. 1980).

yers, the act prescribed preliminary hearings in medical malpractice suits before mediation panels consisting of a doctor, a lawyer, and a judge.<sup>100</sup> The legislature hoped mediation would work to eliminate frivolous malpractice suits and facilitate early settlements of meritorious claims.<sup>101</sup>

*Aldana* involved two doctors who, as defendants in medical malpractice cases, petitioned the high court for an extension in their cases of the statutory ten-month period for panel hearings.<sup>102</sup> In practice, Florida's mediation panels sometimes had trouble meeting the ten-month deadline for action.<sup>103</sup> The defendant doctors in *Aldana*, however, got much more than they asked for. These doctors did not wish to destroy a mediation procedure that the medical profession lobbied through the legislature. Rather, they attempted to enlist the justices' help in making the procedure flexible so that doctors who through no fault of their own missed a panel review within ten months might receive a delayed panel review. The result in *Aldana*, however, was that the doctors not only were denied a panel review, but that the Florida medical profession's prized<sup>104</sup> Mediation Act was declared violative of the due process clauses of the United States and Florida Constitutions. Members of a judicial system in which justice moves only slightly faster than it did in Charles Dickens' *Bleak House* ruled that justice delayed is justice denied.<sup>105</sup>

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100. FLA. STAT. § 768.44(2) (1979).

101. *Aldana*, 381 So. 2d at 239 (Alderman, J., concurring in part, dissenting in part). A principle component of the Medical Mediation Act was a provision making a panel's conclusion on the question of medical negligence available to the jury in the event of a trial. FLA. STAT. § 768.47(2) (1979).

102. FLA. STAT. § 768.44(3) (1979): "If no hearing on the merits is held within 10 months of the date the claim is filed, the jurisdiction of the mediation panel on the subject matter shall terminate, and the parties may proceed [to trial]."

103. The court in *Aldana* referred to 26 district court cases in which mediation jurisdiction was terminated because of inaction within the 10-month period; 15 of these terminations were "no fault of either party." *Aldana*, 381 So. 2d at 236 n.11. The justices in *Aldana* expressed intolerance with delay beyond the Act's 10-month period for a panel hearing, an intolerance, however, which apparently did little to speed up judicial procedures, as evidenced by the *Aldana* appeal itself in which the court first heard oral arguments on September 22, 1978, and then waited a full year-and-a-half later to decide the case. The cases consolidated in *Aldana* were originally filed in circuit court in the summer of 1976; four years in court, and yet no trial! See *Aldana*, 381 So. 2d at 233-34. See generally Ehrhardt, *One Thousand Seven Hundred Days: A History of Medical Malpractice Mediation Panels in Florida*, 8 FLA. ST. U.L. REV. 165 (1980).

104. See Cunningham & Lane, *Malpractice—The Illusory Crisis*, 54 FLA. B.J. 114 (1980).

105. *Aldana v. Holub*, 381 So. 2d 231, 238 (Fla. 1980).



The reasoning the court used to explain the death of mediation panels is convoluted. The court did not say mediation panels are a bad idea, or that selecting alleged victims of medical malpractice out for mediation treatment is invidiously discriminatory. The court seemed to say, rather, that because the Mediation Act, *as interpreted by the court*, denied a few defendant doctors a chance for mediation panel review, the act therefore discriminated among doctors in a manner violative of fair procedure. The key to the court's procedural due process ruling (with help from the Florida Constitution's open courts language) was the court's characterization of the Mediation Act's ten-month deadline for a panel hearing as a *jurisdictional* time limit.<sup>106</sup>

As all lawyers know, the principal function of a time limitation for a legal procedure is to give judges a starting point for granting that first continuance. To carve out of the vastness of the world of law a firm courthouse date which no judge can set asunder is an almost impossible burden. Even in *Aldana*, the court recognized that the ten-month statutory goal for panel hearings can sometimes be extended for special occasions.<sup>107</sup> Nevertheless, the court seemed to sense in the Mediation Act's ten-month period for panel hearings some special urgency which led it to characterize the ten-month deadline as "jurisdictional."<sup>108</sup> The court failed to explain why Mediation Act time periods are "jurisdictional," or why a circuit court judge cannot for good cause, such as the death of a panel member,<sup>109</sup> extend the Act's ten-month time limit. All the court could do was pull out article I, section 21, and praise "speedy access to the courts of Florida,"<sup>110</sup> as if the open courts provision was relevant to an interpretation of the Florida Mediation Act.

Given, however, the court's "jurisdictional" time limit on panel hearings, why didn't the court simply tell the two *Aldana* doctors that because the ten-month deadline had passed in their cases, they must, therefore defend malpractice charges without panel reviews—and otherwise leave mediation panels alive? After all, the Mediation Act had, four years earlier, received constitutional ap-

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106. *Id.* at 235.

107. *Id.* at 235-36.

108. *Id.* at 235.

109. *See, e.g.,* *Cole v. Burrows*, 364 So. 2d 502 (Fla. 4th DCA 1978) (where jurisdiction of the medical mediation panel terminated after the jurisdictional time limit ran, due to the death of a panel member).

110. *Aldana*, 381 So. 2d at 235.

proval from the Florida Supreme Court in *Carter v. Sparkman*.<sup>111</sup> The *Aldana* answer was that *Carter's* endorsement of mediation panels was made prior to much experience with the practical operation of the Mediation Act. According to the court's post-*Carter* survey of district court decisions,<sup>112</sup> the Act's ten-month deadline had operated to arbitrarily to cut off several opportunities for a panel review. Because the Act had so operated in practice, the court found *Carter* no bar to later due process review.

The court went on to insure that the Mediation Act's "jurisdictional," and thus inflexible, ten-month deadline could not be legislatively amended to revive the Act's mediation panels. The court accomplished this by telling the legislature that to amend the Act to allow continuances past ten months would run afoul of, what else, the open courts requirement.<sup>113</sup> As the court noted earlier in *Carter*, "[T]he pre-litigation burden cast upon the claimant reaches the outer limits of constitutional tolerance . . . ."<sup>114</sup> So it was that a ten month delay barely was bearable, and eleven months would violate article I, section 21, of the Florida Constitution.<sup>115</sup>

111. *Carter v. Sparkman*, 335 So. 2d 802 (Fla. 1976).

112. *Aldana*, 381 So. 2d at 236-37.

113. *Id.* at 238.

114. *Carter*, 335 So. 2d at 806.

115. Medical malpractice mediation panels were a common legislative response around the nation to the insurance crisis of the 1970's. A few courts responded like the Florida Supreme Court by finding constitutional infirmities in such pre-litigation panel review. See, e.g., *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (violation of separation of powers and right to jury trial); *Heller v. Frankston*, 504 Pa. 528, 475 A.2d 1291 (1984) (review panel burdens right to jury trial), *aff'g Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980); *Boucher v. Sayeed*, 459 A.2d 87 (R.I. 1983) (violation of medical malpractice victim's equal protection guarantee under circumstances where judicial notice reveals lack of a medical malpractice crisis).

Medical malpractice panels established by legislation similar to the Florida Mediation Act also have been sustained against constitutional attacks, including claims based on jury trial guarantees. See, e.g., *Woods v. Holy Cross Hosp.*, 591 F.2d 1164 (5th Cir. 1979); *Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977); *Everett v. Goldman*, 359 So. 2d 1256 (La. 1978); *Attorney Gen. v. Johnson*, 282 Md. 274, 385 A.2d 57 (1978); *Paro v. Longwood Hosp.*, 373 Mass. 645, 369 N.E.2d 985 (1977); *Predergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977); *Comiskey v. Arlen*, 55 A.D.2d 304, 390 N.Y.S.2d 122 (N.Y. App. Div. 1976), *aff'd*, 43 N.Y.2d 696, 372 N.E.2d 34, 401 N.Y.S.2d 200 (1977); *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 261 N.W.2d 434 (1978).

The New Hampshire Supreme Court, perhaps even more inhospitable than the Florida Supreme Court to legislative tort reform, found the following statutory medical malpractice reforms fell short of equal protection for malpractice plaintiffs: requirement that an expert medical witness be expert in the area of practice alleged to have caused injury; abolition of discovery rules except where a foreign object is discovered in a patient's body; requirement of notice of intent to sue; abolition of the collateral source rule; discretionary provision for

It is worth noting that just as the court felt justified in *Aldana* in revisiting the constitutionality of mediation panels, the court also has given notice that a revisiting of the personal injury portion of the No-Fault Auto Insurance Act, in light of possible negative experience with the law's application, is always possible.<sup>116</sup> A future court therefore could conceivably void no-fault auto insurance by finding the statute an inadequate (*Kluger*) alternative to the fault system because, for example, no-fault experience arguably shows that: crowded court conditions have not been improved; insurance costs have not been reduced; the traditional tort system has not been shown inadequate to the task of fairly compensating traffic victims; or that the crisis in torts giving rise to no-fault legislation, if ever such a crisis in fact existed, is no longer in evidence.<sup>117</sup>

### B. Amendment Nine

The Florida high court's most visible participation in the growing debate over torts involved not a statutory reform but a proposed state constitutional amendment. This was the widely publicized Amendment Nine which the mostly doctor members of Reason '85, The Committee For Citizens' Rights In Civil Actions, proposed in April, 1984, as a citizens' initiative for the general election ballot.<sup>118</sup> Amendment Nine, if adopted, would have abolished the common law's joint and several liability, limited pain and suffering damages to \$100,000, and encouraged cost-saving grants of summary judgments in damage suits.<sup>119</sup>

One of the lawyerly groups opposing Amendment Nine, in addition to the Florida Bar and the state Academy of Trial Lawyers, was Floridians Against Constitutional Tampering, led by former

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periodic payments; and a contingent fee scale for plaintiffs' lawyers. *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980).

116. *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 17 (Fla. 1974). For a plea by a Florida plaintiffs' lawyer for the Florida Supreme Court to aggressively review no-fault experience for signs of late-developing constitutional defects, see Levin, *Visiting Florida's No-Fault Experience: Is It Now Constitutional?*, 54 FLA. B.J. 123-128 (1980).

117. See *Lasky*, 296 So. 2d at 16. Representatives of a leading Florida plaintiffs' firm make the case for the "illusory" crisis in medical practice in Cunningham & Lane, *supra* note 104, at 119-21. Another allegedly illusory area, according to trial lawyers, is the series of media reports allegedly inflating the size of average jury awards in personal injury cases. See *Misuse of Tort Statistics Clouds Debate*, 29 ATLA L. REP. 51 (1986).

118. Note, *Amendment Nine and the Initiative Process: A Costly Trip to Nowhere*, 14 STETSON L. REV. 349 (1985)[hereinafter *Costly Trip*].

119. *Amendment taken off ballot*, Tallahassee Democrat, Oct. 4, 1984, at A1, col. 2. See also *How the Doctors Spell Relief*, NEWSWEEK, Sept. 17, 1984, at 73.

Florida Supreme Court Justice Alan Sundberg.<sup>120</sup> Sundberg, who authored the majority opinion in *Aldana* burying mediation panels and who also judged that automobile no-fault's partial elimination of pain and suffering damages was an open courts infringement,<sup>121</sup> preached compassion at a press conference blast against Amendment Nine: "Our society has always been sympathetic and empathetic to innocent victims . . . . Why should we shift our concern from the innocent victim to the [wrongdoer]?"<sup>122</sup> Agreeing with Sundberg that the doctor-sponsored citizens' initiative was bad medicine was the president of ATLA: "[T]his is not a lawyers v. doctors fight, but a battle for the rights of every citizen in the state of Florida, and indeed of this nation . . . . The trial lawyer very often stands alone between the unfortunate victims and the monied powers that seek to curtail citizens' rights . . . ." <sup>123</sup>

The Florida Supreme Court in October, 1984, declared in *Evans v. Firestone*<sup>124</sup> that Amendment Nine was constitutionally defective, and removed that initiative from the November ballot. In so doing, the court improved its reputation with plaintiffs' lawyers, and perhaps also showed how far it is willing to go to slow tort reform.<sup>125</sup> Yet, confident guessing about judicial motives here is risky because the court's conduct in removing constitutional initiatives from ballots has been extremely erratic in recent years. A brief review of the court's record on amendment initiatives may be helpful in evaluating *Evans v. Firestone*.

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120. *Former chief justice blasts malpractice amendment*, Tallahassee Democrat, Sept. 13, 1984, at B1, col. 1.

121. *Chapman v. Dillon*, 415 So. 2d 12, 19 (Fla. 1982) (dissenting opinion).

122. *Amendment Taken off Ballot*, *supra*. See also Orrick, *FACT To Fight Amendment 9*, Fla. Bar News, Sept. 1, 1984, at 1, col. 4, for a report on Justice Sundberg's alerting "the public to the danger of recklessly tampering with our constitution."

123. Baldwin, *Who Shall Decide the Value of a Human Life*, TRIAL, Oct. 4, 1984, at 4.

124. 457 So. 2d 1351 (Fla. 1984).

125. The court's October decision came so near election day that Amendment Nine proponents had no time to cure their initiative's ills and have a corrected proposal ready by election day. This was not the first time Florida voters have been denied an opportunity to express their views on proposed constitutional amendments due to last-minute ballot deletions ordered by the Florida Supreme Court. For example, the court has removed from the ballot amendment proposals for a unicameral legislature, *Adams v. Gunter*, 238 So. 2d 824 (Fla. 1970), and for requiring financial disclosure by ex-legislators serving as lobbyists, *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982). In the case of Amendment Nine in 1984, doctors who supported the doomed initiative and trial lawyers in opposition together spent \$5 million pressing their cases with voters who never got to vote. *Amendment Taken Off Ballot*, *supra* note 119.

This odd series of cases began in 1970<sup>126</sup> when the court ruled<sup>127</sup> that a proposed people's amendment for a unicameral legislature was outside the permissible limits of the 1968 Florida Constitution's reservation to the people of the "power to propose amendments to any section of this constitution."<sup>128</sup> The court declared the unicameral idea so "revolutionary"<sup>129</sup> a change as to amount to a *revision* of the entire constitution, and so outside the constitutional power granted the people to propose amendments to individual sections.<sup>130</sup>

Following the Supreme Court's niggardly 1970 reading of the scope of the citizens' initiative privilege, a seemingly displeased Florida Legislature in 1972 initiated a redrafting of article XI, section 3, to authorize "revolutionary" initiatives: "The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment shall embrace but one subject and matter directly connected therewith."<sup>131</sup>

Since this 1972 expansion of initiative rights, the legal debate concerning attacks on citizen initiatives has shifted. The favorite attack today is to assert that an initiative contains at least two subjects and so is disqualified from appearing on a general election ballot.<sup>132</sup> Even though the supreme court has heard a number of post-1972 claims that a proposed initiative violates the "one subject" limitation in the current article XI, section 3,<sup>133</sup> the court has been unable to give much meaning to the "one subject" requirement. Still the court appears willing to act aggressively on occasion to keep off the ballot initiative proposals such as Amendment Nine's proposed tort reforms.

After two post-1972 decisions approving initiatives in which the court chose to play a passive role,<sup>134</sup> in 1984 the court in the *Evans*

126. See *Costly Trip*, *supra* note 118, at 368.

127. *Gunter*, 238 So. 2d at 824.

128. FLA. CONST. art. XI, § 3 (1968).

129. *Gunter*, 238 So. 2d at 830.

130. *Id.* at 829.

131. FLA. CONST. art. XI, § 3 (1968 amended 1972).

132. See, e.g., *Fine v. Firestone*, 448 So. 2d 984, 989 (Fla. 1984).

133. For an excellent explication of post-1972 Supreme Court discussions of article XI, section 3's "one subject" limitation, see *Costly Trip*, *supra* note 118 at 358-62.

134. *Floridians Against Casino Takeover v. Let's Help Florida*, 363 So. 2d 337 (Fla. 1978) (proposed constitutional amendment to legalize gambling, its taxation, and distribution of taxes to educational institutions embodied only one subject); *Weber v. Smathers*, 338 So. 2d 819 (Fla. 1976) (proposed "Sunshine Amendment" promoting ethics in government by requiring such things as financial disclosure by public employees and limitations on lob-

attack on Amendment Nine (and in a suit attacking a citizens' initiative proposing California-type limits on state and local taxing powers<sup>135</sup>) reassumed its activist posture. The earlier examples of judicial deference were qualified, the "one subject" limit on initiative proposals was revived to cut down disfavored initiatives, and the law was left pointing in two directions at once.

In the case of the ill-fated Amendment Nine, the court asserted that the proposed tort reform initiative unconstitutionally dealt with two subjects—limiting damages and promoting summary judgments.<sup>136</sup> *Evans'* weak rationalization for finding an impermissible double subject in Amendment Nine is the notion that limiting awards is one subject, a "legislative" function, and that the summary judgment matter is another subject, a "judicial" function. The court in *Evans*, moreover, could see no connection, in "one subject" terms, between limiting awards and promoting greater reliance on the cost-saving summary judgment device. Although both reforms might work to reduce litigation costs and help alleviate the insurance crisis, the court nevertheless perceived qualitative differences.<sup>137</sup>

So technical and legalistic was the *Evans* court's dismembering of Amendment Nine's simple tort reform, it calls to mind Chief Justice Ervin's 1970 dissent against killing the citizens' initiative

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byists held constitutionally valid). The ambiguity inherent in a concept such as "one subject" is such that a court so inclined could reduce the concept to such a low level of generality that the constitutional citizens' initiative would become even more impotent and illusory than Florida's is currently.

135. *Fine*, 448 So. 2d at 986.

136. *Evans v. Firestone*, 457 So. 2d 1351, 1354 (Fla. 1984).

137. Giving credence to the court's explanations of its "one subject" rulings is even more difficult after *Smith v. Department of Ins.*, 12 Fla. L.W. 189 (Fla. 1987). In *Smith* the justices balked at voiding the entire Florida Tort Reform and Insurance Act of 1986; the justices, therefore, found the reform statute's various and disparate rearrangements of both tort law and insurance regulation a single subject. *Id.* at 189-191. Even granting that tougher "one subject" scrutiny should be given to constitutional amendments than legislative bills, it nevertheless makes little sense to label 1986's multifarious response to the insurance crisis "one subject" and yet deny that same constitutional label to Amendment Nine's relatively puny effort to remedy the rising costs and increasing unavailability of liability insurance.

The court, after having written opinions spreading fog all around the "one subject" rule, opinions which befuddle even some of the justices, see *Fine*, 448 So. 2d at 996 (Ehrlich, J. concurring in result), nevertheless in *Evans* grounded its anti-Amendment Nine result alternatively on section 101.161, Florida Statutes which requires constitutional amendments placed on the ballot to be printed in plain language. Neither the Florida Constitution nor state statutory law provides a mechanism whereby the attorney general or some other official preliminarily screens or redrafts citizens' proposed ballot amendments. Given the sad state of the English language in most government circles, it hardly behooves Florida's justices to criticize the prose style of the laity.

for a unicameral legislature.<sup>138</sup> Ervin warned of overly technical judges crippling the people's initiative rights:

Because a proposal may be radical, chaotic or revolutionary in the minds of some is no justification for its rejection *ab initio* as unconstitutional. After all, a great degree of confidence must necessarily be reposed in the good judgment of the people . . . to weed out the chaotic, the radical, and the revolutionary.<sup>139</sup>

### C. *The Florida Tort Reform and Insurance Act of 1986*

The most extensive single package of reform measures coming out of a state legislature in recent years is the series of tort law changes contained in Florida's Tort Reform and Insurance Act of 1986.<sup>140</sup> This act offers no radical substitutes for common law torts. Florida's 1986 reform package is rather an accumulation and extension of a series of standard bandaid reforms aimed at shoring up a leaking tort system. This major legislation was put into a single package because the rising costs of personal injury litigation was a major factor contributing to the crisis in insurance.<sup>141</sup> The single package approach may also have been necessary to assure passage of a very controversial bill which saw both the insurance industry and the trial bar give up as well as gain ground.<sup>142</sup>

This reform package entered Florida law just as ATLA's Constitutional Challenge Committee cleared its decks for anti-reform action, a concurrence no doubt attributable to the passage in 1986 of reform legislation by almost half the states. Florida's 1986 legislation outdid most other state reforms by including provisions both freezing and conditionally rolling back liability insurance rates, and increasing state regulatory power over the insurance industry.<sup>143</sup> Florida's act also altered the state's civil litigation process in so many ways that the personal injury bar had a right to be angry, not only because of damage to lawyer incomes, but because of the

138. *Adams v. Gunter*, 238 So. 2d 824, 833 (Fla. 1970) (Ervin, C.J., dissenting).

139. *Id.* at 834.

140. The Act has been designated as Ch. 86-160, Laws of Fla., codified in §§ 768.71-81 FLA. STAT. (Supp. 1986). By 1986, at least 34 states had passed some form of tort reform legislation; however, in only nine of those states are the reforms approved deemed significant. See *Tort Reform Explodes*, BUSINESS INS., Aug. 18, 1986, at 1.

141. *Smith v. Department of Ins.*, 12 Fla. L.W. 189, 190 (Fla. 1987). See also Fort, *supra* note 8 at 533-44.

142. See generally Fort, *supra* note 8.

143. *Radical Changes for Civil Litigation in Florida*, FLA. B.J., Nov. 1986, at 25.

tedious chore of keeping up with all the complicated legislative revision of common law torts.<sup>144</sup>

Florida's Tort Reform and Insurance Act altered common law tort law as follows: it limited punitive damages to three times the compensatory damages awarded, with sixty percent of any punitive damage award to be paid into the state treasury;<sup>145</sup> it reduced a plaintiff's award by amounts available from certain collateral sources;<sup>146</sup> it provided for future economic damages exceeding \$250,000 to be paid by periodic payments;<sup>147</sup> it included a procedure whereby a plaintiff or defendant whose settlement offer is refused may recover costs and attorney's fees, should the final judgment vary no more than twenty-five percent from the settlement offer;<sup>148</sup> it capped noneconomic damages at \$450,000 per person;<sup>149</sup> it abolished joint and several liability for noneconomic damages for awards over \$25,000;<sup>150</sup> and it penalized a losing party or attorney in cases where a complaint or defense is frivolous.<sup>151</sup>

The Florida Tort Reform and Insurance Act of 1986 was challenged immediately by, among others, the Academy of Florida Trial Lawyers. The Academy contended at trial that the tort reform provisions violate the Florida Constitution's equal protection, due process, trial by jury, and open courts clauses, as well as the state constitutional command that each legislative bill be limited to a single subject.<sup>152</sup>

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144. Since the early 1970's, chapter 768 of the Florida Statutes (the negligence chapter) has been altered by a long series of reform measures. The 1986 Tort Reform Act is but a continuation of the changing face of tort law in Florida and across the nation. Florida's 1986 legislation to some extent builds upon earlier statutory reforms in the medical malpractice area, and widens the reach of these reforms to all personal injury litigation. *See generally, id.*

145. Ch. 86-160, 1986 Fla. Laws 695 at § 52 (creating FLA. STAT. § 768.73).

146. *Id.* § 56 (creating FLA. STAT. § 768.76).

147. *Id.* § 57 (creating FLA. STAT. § 768.78).

148. *Id.* § 58 (creating FLA. STAT. § 768.79).

149. *Id.* § 59 (creating FLA. STAT. § 768.80). The Florida Supreme Court held the \$450,000 cap on non-economic damages to be unconstitutional in *Smith v. Department of Ins.*, 12 Fla. L.W. 189 (Fla. 1987). This case will not be final until rehearing possibilities are extinguished. The court held that the provision violated the Florida Constitution's open courts clause, art. I § 21 and, incidently, the trial by jury clause, art. I § 22.

150. *Id.* § 60 (creating FLA. STAT. § 768.81).

151. *Id.* § 61 (amending FLA. STAT. § 57.105).

152. *Amer. Ins. Ass'n v. State*, Case No. 86-2262 (Fla. 2d Cir. Ct. 1986). The Leon County Circuit Court upheld the constitutionality of all the Act's tort reform provisions.

The open courts clause of the Florida Constitution, FLA. CONST. art. I, § 21, has in recent years been seized upon by opponents of tort reform as a convenient symbol for the notion that traditional tort remedies are too precious to permit any legislative tinkering except of the most minor sort.



The Florida Supreme Court declared in *Smith v. Department of Insurance*<sup>153</sup> that the major insurance company gain, the \$450,000 cap on pain and suffering damages, violates the state constitution's open courts clause. Although the court in *Smith* also ruled unconstitutional some minor premium rebate provisions disliked by the insurance industry,<sup>154</sup> insurance people probably feel they did something foolish when they worked out a deal with one set of lawyers, knowing they had to go before another set of lawyers (judges) with the power to turn the compromise on its ear.

The supreme court's reasoning in declaring the damages-cap provision of the 1986 compromise unconstitutional was fragmented. Justices Ehrlich, Barkett, and Adkins voted to void the entire Act. These three thought the package deal violated the single subject requirement for legislative bills. They, along with Justices Shaw and Kogan, joined to kill the cap on pain and suffering damages. In addition to the court's per curiam opinion, three justices wrote separately by way of partial dissents. No more than three justices joined in any particular theory of the case.

As with previous opinions applying the open courts clause to legislative tort reform, the court in *Smith* made no effort to grapple with the tough economic and social problems raised by the crisis in torts and insurance. The court seemed to finally recognize that perhaps the legislature knows what it is talking about when it says there is a crisis in both the availability and affordability of liability insurance.<sup>155</sup> Nevertheless, the majority of the justices were content with a shallow analysis of the tort reform problem in terms of playing definition games with the concept of open courts. One question never successfully answered by the court is how, if a cap on damages unconstitutionally closes the courthouse door, does the Tort Reform Act's modification of joint and several liability and other damage-reducing features escape the constitutional axe.<sup>156</sup>

153. *Smith*, 12 Fla. L.W. 189.

154. *Id.* at 194-195.

155. *Id.* at 190-191.

156. The *Smith* court's weak rationale for finding the courts open to plaintiffs shut out by the demise of joint and several liability is to fall back on the old causation ploy: "We find no violation of the right of access to the court because that right does not include the right to recover for injuries beyond those caused by the particular defendant." *Id.* at 193. This apparently means plaintiffs before 1986 collected damages which defendants did not cause, or else it means there is no right of access here because there is no right of access. For further insights into the tricks of the causation doctrine see Vinson, *Proximate Cause Should be Barred from Wandering Outside Negligence Law*, 13 FLA. ST. U.L. REV. 215 (1985).

The court in *Smith* found *Kluger* controlling with respect to the cap on pain and suffering damages. Despite the legislature's long preamble to its 1986 reform package detailing the severe ramifications of the insurance crisis,<sup>157</sup> the court could not find the "overpowering public necessity" which *Kluger* requires to sustain certain tort reforms.<sup>158</sup> The court, moreover, could not find in the Tort Reform Act the required "commensurate benefit" justifying a limit on plaintiffs' recoveries. The court was unwilling to consider the limited immunity from tort liability, which a damages cap provides for everyone, a "commensurate benefit" for injured plaintiffs. The court reasoned that plaintiffs are unlikely to be negligent and therefore unlikely to need tort immunity.<sup>159</sup> Nor did the idea that all will benefit from a more stable insurance industry strike the court as a "commensurate benefit."<sup>160</sup>

As in *Kluger*, the court made no independent investigation of the depth and intensity of the crisis which led the 1986 legislature to make tort reform the major focus of the session. Instead the court was content with referring to damages caps that cannot meet its *Kluger* tests as the product of "majoritarian whim."<sup>161</sup> In sum, the court did not purport to know anything about the crisis into which it was willing to stumble, and the reader of *Smith* is not able to tell from the court's words anything about why the court felt compelled to intervene. Assuming that the *Smith* decision withstands any rehearing motions, the supreme court has given renewed notice that, despite a fragmented court, the trial bar still has friends in high places. If the legislature wishes to reform tort law in ways that will drastically affect lawyer income, it may take a constitutional amendment.

## V. CONCLUSION

If it is the "good judgment of the people" which should in the end control how government answers the compensation needs of accident victims, then judges should allow legislators and voters a

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157. *Smith*, 12 Fla. L.W. at 195.

158. *Id.* at 191-192. The court noted as well that no party to the litigation argued that an "overpowering public necessity" prompted a damages cap. *Id.* at 192.

159. *Id.* at 191.

160. *Id.* at 192. See *Fein v. Permanente Medical Group*, 38 Cal.3d 137, 695 P.2d 665, 681-682 n.18, 211 Cal. Rptr. 368 (1985) *appeal dismissed*, 106 S.Ct. 214 (1985), for the California Supreme Court's recent willingness to consider stabilization of the medical malpractice insurance industry a decent trade-off for limiting noneconomic malpractice damages.

161. *Smith*, 12 Fla. L.W. at 192.

freer hand to legislate new tort law, or, if the public sees fit, replace tort law with alternative compensation schemes. The courts are a particularly inappropriate institution for sorting out the terribly complex factors that contribute to the tort crisis. So far, legislatures around the country have only begun to sort out the intricate mechanisms by which the insurance industry operates. If legislatures have trouble gathering reliable data about our insurance system, it is unlikely that a court, with its institutional restraints on gathering information, will be in a position to confidently second-guess a legislature's judgment about a liability insurance crisis and the appropriate government response.

Nor are courts well suited to gather empirical data about how the tort system functions. Judges are limited in their ability to discover, for example: how many accident victims go uncompensated; the percentage of awards attributable to intangible losses; the effect of caps on awards or on attorneys' fees; the effect of modifying joint and several liability, or ending the collateral source rule; whether and when strict products liability promotes safer products; and the percentage of the liability insurance dollar going for attorneys' fees, insurance company overhead, expert witnesses, and other costs of trial.

Furthermore, even were judges sitting on top of the best information available about litigation explosions and insurance practices, given the tenacity with which their legal brothers and sisters of the bar are fighting tort reform, are these ex-lawyers-turned judges in a position where they can fairly resolve matters which mean so much financially to large and powerful segments of the state bar? Current Florida Bar President and personal injury lawyer Joe Reiter in 1984 explained to the Florida Bar Board of Governors, and indirectly to the Florida Supreme Court, how important it is for the legal community to band together to preserve the tort system from outside interference:

'I move we direct our staff and the president to take whatever action is necessary [to defeat Amendment Nine] and spend whatever money is necessary to fight this amendment—to put on extra staff if necessary—because this is a crisis matter. It may not affect corporate lawyers or probate lawyers right away, but it will soon affect all of us. It should not be allowed to happen.'<sup>162</sup>

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162. Orrick, *Legislative activism reflected in two Board votes*, Fla. Bar News, August 1, 1984, at 1, col. 1.

The Florida Legislature to date has failed to distinguish itself in its tentative piecemeal approach to dealing with the tort crisis. But awkwardness in dealing with the tort crisis is something the Florida Supreme Court shares with the Florida Legislature. The court would do well to recognize that it has had its chance to devise a workable tort system — and now its the legislature's turn.

